(1990) 10 MAD CK 0007

In the Madras High Court

Case No : Criminal M.P. No''s. 5042, 5044, 5046, 5048, 5050, 5052, 5054, 5056, 5058 and 5060 of 1986

Jagannathan and Another APPELLANT

Vs

The State RESPONDENT

Date of Decision : 12-10-1990

Acts Referred:
Companies Act, 1956 — Section 633
Criminal Procedure Code, 1973 (CrPC) — Section 482
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14A

Citation : (1991) LW(Cri) 44

Hon'ble Judges : Arunachalam, J

Bench : Single Bench

Advocate : B. Sriramulu and V. Parthiban, for the Appellant; V. Vibhishanan and R. Ganesan, for the Respondent

Judgement

Arunachalam, J.—All these petitions are disposed of together, since the Petitioners and the Respondent are the same and the question raised

is also common. The prayer in these petitions filed u/s 482 Code of Criminal Procedure, is to call for the records and set aside the order of the

Additional Judicial First Class Magistrate, Coimbatore, made in

(a) Crl. M.P. No. 2540 of 1985 in S.T.R. No. 290 of 1985,

(b) Crl. M.P. No. 2273 of 1985 in S.T.R. No. 682 of 1985,

(c) Crl. M.P. No. 2274 of 1985 in S.T.R. No. 681 of 1985,

(d) Crl. M.P. No. 2541 of 1985 in S.T.R. No. 291 of 1985,

(e) Crl. M.P. No. 2275 of 1985 in S.T.R. No. 520 of 1984,

(f) Crl. M.P. No. 2536 of 1985 in S.T.R. No. 292 of 1985,

(g) Crl. M.P. No. 2538 of 1985 in S.T.R. No. 288 of 1985,

(h) Crl. M.P. No. 2272/85 in S.T.R. No. 683 of 1984,

(i) Crl. M.P. No. 2539 of 1985 in S.T.R. No. 289 of 1985 and

(j) Crl. M.P. No. 2537 of 1985 in S.T.R. No. 287 of 1985.

In each one of these cases, the respective Petitioners are being prosecuted for offences committed u/s 14(1B) and 14A of the Employees''

Provident Fund and Miscellaneous Provisions Act, 1952, read with the Employees'' Deposit-linked Insurance Scheme, 1976. The Petitioners, as

stated in the complaints, had failed to pay the contributions and administrative charges for various periods within the prescribed time, thus making

themselves liable to be prosecuted.

2. The Petitioners in each one of these prosecutions, had filed applications before the trial Magistrate, u/s 633 of the Companies Act, for getting

themselves relieved from the offences stated to have been committed by them. It was the case of the Petitioners before the trial Court, that they

had acted reasonably and the default to which they were sought to be made liable, was due to circumstances beyond their control. The trial

Magistrate took the view that he was not competent to entertain an application u/s 633(1) of the Act. During the process of reasoning, the trial

Magistrate referred to Section 633(2) and (3) of the Act and observed that notice not having been sent to the Registrar of Companies or such

other person as contemplated u/s 633(3) of the Act, the petitions had to be necessarily dismissed.

3. It is these orders passed in the various miscellaneous petitions referred to above, that are sought to be challenged in all these petitions.

4. Mr. B. Sriramulu, learned Counsel appearing on behalf of the Petitioners in all these petitions contended, that the expression ""any proceeding

occurring in Section 633 of the Companies Act was of a wide amplitude and comprehensive enough to include all kinds of proceedings, civil as

well as criminal, and there was nothing in the language or the context in which this Section was laid, to limit, restrict or confine its operation to a

liability arising out of negligence, default, breach of duty, misfeasance or breach of trust under the Companies Act alone, so long as it was with

regard to the affairs and functioning of the company. In other words, according to the learned Counsel, the provisions of Section 633 of the

Companies Act would be applicable in respect of liabilities under Acts other than the Companies Act as well, and therefore, the Petitioners in each

one of these cases had rightly invoked the jurisdiction of the trial Magistrate u/s 633(1) of the Act. The learned Counsel has placed before me

certain decisions of the Delhi, Punjab and Bombay High Courts, which only are the decisions available on the subject.

5. Mr. V. Vibhishanan, learned Counsel appearing on behalf of the Respondent in each one of these petitions would strenuously contend, that

Section 633 of the Companies Act was not wide enough to cover criminal prosecutions commenced under Acts other than the Companies Act.

The learned Counsel fairly stated that the law available on the subject had already been placed before Court by the learned Counsel for the

Petitioners.

6. The question to be decided in these Petitions is, whether the provisions of Section 633 or the Companies Act is restricted only in respect of

criminal and civil proceedings, which are likely to be instituted in respect of any default prescribed under the Companies Act or would take in or

cover criminal prosecutions commenced under Acts other than the Companies Act.

7. Even at the outset, before referring to the case law on the subject, it appears to my mind, that Section 633 of the Companies Act may have to

be restricted to prosecutions arising under the Companies Act alone. The various enactments, which provide for the prosecution of a company and

its Directors, have relevant provisions in the respective Acts themselves, fixing the liability of such of those Directors who were actually in charge of

and were responsible to the companies for the conduct of the business of the company. Such Sections in several enactments, which deal with

offences by the companies, have invariably a Proviso attached which states, that such person shall not render himself liable to any punishment if he

proved that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such an

offence. The Supreme Court has clearly held on more than one occasion, that the Proviso will be attracted only after the prosecution initially

discharges its burden of establishing that a Director of a Company was, in fact in charge of and was responsible to the company for the conduct of

the business of the company at the relevant time when the offence was allegedly committed. Therefore, it is fairly apparent that a Director of a

company, who is sought to be prosecuted, though he was not, in fact in charge of and responsible to the company for the conduct of its affairs, can

always get himself exonerated, if basic proof of his active participation in the day-today affairs of the company, was not evident even on the

averment made in the complaints. Thus there is an inbuilt protection in the enactments themselves.

8. Section 633 of the Companies Act seems to be one of such provisions where an officer of a company, which term would include a Director as

well, who had acted honestly and reasonably, ought to be fairly excused, having regard to all the circumstances of the case, including these

connected with his appointment.

9. As stated earlier, several enactments, many of them subsequent to the Companies Act, have an inbuilt protection for the Directors, who are not

actually in charge of and responsible for the day-to-day conduct of the business of the Company. An act may not have been an offence when the

Companies Act was enforced and, therefore, it is difficult to see how the Companies Act could be made applicable, when particularly the other

enactments themselves define the offence and provide punishment for offences or defaults, as the case may be, committed by the companies and or

its Directors. The prosecution against a company and or its Directors, to quote a few examples, is provided under the income tax Act, Essential

Commodities Act, the Sales Tax Act, Indian Electricity Act, Prevention of Food Adulteration Act and even the Act in question in this case, the

Employees'' Provident Funds and Miscellaneous Provisions Act, 1952. If Section 633 of the Companies Act were to be made applicable

omnibus, the purpose of various Sections in other enactments dealing with prosecution of companies and or its Directors would prima facie appear

to be superfluous.

10. Now let us scrutinize the case law on the subject. In Om Parkash Khaitan v. Shree Keshariya Investments Ltd. 48 Company Cases, 85, H.L.

Anand, J., of the Delhi High Court, while considering offences alleged to have been committed and proceedings apprehended for default or

breaches by a Solicitor appointed Director by virtue of his being legal adviser and was not taking active part in the management of the affairs of the company, held that he was entitled to relief u/s 633 of the Act, though the prosecution against him arose under the Employees'' Provident Fund

Act, the Employees'' State Insurance Act, the Sales-tax Act, Essential Commodities Act as well as the Companies Act. The learned judge

observed as here under:

...In determining whether relief should be granted u/s 633 or not, it was necessary to make a distinction between those, directors who were on the

Board purely by virtue of their technical skill or because they represented certain special interests and those who were in effective control of the

management and affairs of the company, whether or not they had any financial stake in it, and it would be unreasonable to fasten liabilities for

defaults and breaches of the company where such directors were either nominee directors or were appointed by virtue of their special skill or

expertise but did not participate in its management. Judicial moderation was necessary in the administration of Section 633 of the Act so as to

ensure that such categories of directors were not subjected to the harassment of legal proceedings for breaches and defaults of the company,

which might at times be rather protracted. It would be proper in such cases to relieve such directors of consequences of the defaults and the

breaches unless they were directly involved in the act or omission complained of or had otherwise not acted honestly or reasonably or had financial

involvement in the company.

There is not much of discussion by the learned Judge, while he arrived at the conclusion, that the object of the Section appeared to be to provide

against undue hardship in deserving cases and to give relief from liability to persons who, though liable in law, ought to be excused rather than be

allowed to be subjected to legal proceedings.

11. A Division Bench of the Delhi High Court in In re Beejay Engineers Pvt. Ltd. 53 Company Cases 918 considered the very same question. The

Division Bench took the view, that the Court had discretion to relieve an officer from liability and the relief can also be given in respect of liability

under Acts other than Companies Act. It also observed, that criteria for affording relief was explicit in Section 633 of the Companies Act itself.

12. The Division Bench went on to add as here under:

Upon its plain language, Section 633, the design and object of which is to provide protection to the officers of a company against certain kinds of

liabilities and undue hardship and harassment in deserving cases, confers a discretion on the court to relieve an officer from the same, if the officer

proceeded against for any negligence, default, breach of duty, misfeasance or breach of trust, is able to satisfy the conscience of the court that he

had acted honestly and reasonably and also, having regard to all the circumstances of the case, he ought fairly to be excused. ""Acting reasonably

means acting in the way in which a man of affairs dealing with his own affairs with reasonable care and circumspection could reasonably be

expected to act in such a case. No distinction can be drawn amongst the directors for fastening the liability or granting a relief from the liability on

the consideration that a person is on the Board purely by virtue of his technical skill or because he represents certain special interests and there are

other directors who are in effective control of the management and affairs of the company. Since the criteria for granting relief have been explicitly

laid in the Section itself, no other criteria can be imported into it, though the circumstances of a person being purely on the Board on account of his

special skill or expertise may be a relevant factor in deciding whether he had acted honestly and reasonably in conjunction with other circumstances

of the case.

B.N. Kirpal, J., of the Delhi High Court expressed a doubt as to the correctness of the decision in Om Parkash Khaitan v. Shree Keshariya

Investments Ltd. 48 Company cases 85, referred to earlier by me, and that necessitated this Division Bench to go into the question. The Division

Bench observed, that the discretion vesting in the Court had to be exercised in favour of the officer concerned when the Court was satisfied about

the existence of the conditions found in the Section. Of course, the Court had to take note of all the attending circumstances of the case for arriving

at a judicious and just decision. Looking from that angle, the Division Bench observed, that B.N. Kirpal, J., was right in saying that no distinction

can be drawn amongst Directors for fastening liability or granting relief from liability on the consideration that a person was on the Board purely by

virtue of his technical skill or because he represented certain special interests and there were other directors who were in effective control of the

management and affairs of the company. The Division Bench felt that H.L.

Anand, J., had overstated the point while he observed as hereunder, in

48 Company Cases 85:

...it is necessary to make a distinction between the Directors who are on the Board, purely by virtue of their technical skill or because they

represent certain special interests and those who are in the effective control of the management and affairs of the company, whether or not they

have any financial stakes in it, in determining if relief from liability arising out of the breaches and defaults of the company should be granted or not.

Ultimately the Division Bench observed, that the criteria for granting relief having been explicitly laid down in the section itself, no other criteria can

be imported into it.

13. The Punjab and Haryana High Court In the matter of Muktsar Electric Supply Co. Ltd. 36 Company Cases 144 held, that the High Court can

grant relief under Sub-section (2) as the Sub-section was wide enough to cover criminal prosecutions. As rightly observed by Pendse, J., of the

Bombay High Court, to which I will refer a little later, there cannot be any quarrel with the proposition, but the Sub-section is not wide enough to

cover criminal prosecutions, commenced under Acts other than the Companies Act.

14. Pendse, J., of the Bombay High Court went into this question elaborately in Hareshchandra Maganlal and others Vs. Union of India and

others, The learned Judge had taken note of the Division Bench decision of the Delhi High Court as well as the earlier Punjab and Haryana High

Court decision. The subsequent decision of the Delhi High Court reported in Jagannath Prasad Jhalani v. Regional Provident Fund Commissioner

(Haryana) 1987 Tax L.R. 1742 was also taken note of. Before referring to the views of the learned Judge, it will be better to extract Section 633

of the Companies Act:

633. (1): If any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, appears to the

Court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he

has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he

ought fairly to be excused, the Court may relieve him, either wholly or partly, from his liability on such terms as it may think fit:

Provided that in a criminal proceeding under this Sub-section, the Court shall have no power to grant relief from any civil liability which may attach

to an offender in respect of such negligence, default, breach of duty, misfeasance or breach of trust.

(2) Where any such officer has reason to apprehend that any proceeding will or might be brought against him irrespect of any negligence, default,

breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the high Court on such application shall have the same

power to relieve him as it would have had if it had been a Court before which a proceeding against that officer for negligence, default, breach of

duty, misfeasance or breach of trust had been brought under Sub-section (1).

(3) No Court shall grant any relief to any officer under Sub-section (1) or Sub-section (2) unless it has, by notice served in the manner specified by

it, required the Registrar and such other person, if any, as it thinks necessary to show cause why such relief should not be granted.

The learned Judge held as follows:

Shri Tulzapurkar, learned Counsel appearing on behalf of the Petitioners, submitted that the ambit of Sub-section (2) of Section 633 of the

Companies Act is very wide and the expression ""any proceeding"" would include proceedings arising not only out of the default committed under

the provisions of Companies Act, but defaults under any statute. It is not possible to accede to the submission of the learned Counsel. Section 621

of the Companies Act provides that no Court shall take cognizance of any offence against this Act except on the complaint in writing of the

Registrar, or of a shareholder of the company or of a person authorized by the Central Government in that behalf. Section 622 of the Companies

Act provides that no Court inferior to that of a presidency Magistrate or a Magistrate of the First Class shall toy any offence against this Act.

Section 524 provides that every offence against the Act shall be deemed to be non-cognizable within the meaning of Code of Criminal Procedure,

1898. The subsequent Sections deal with the procedure to be followed in respect of complaints and the penalty to be imposed. The subject of

offence"" is dealt with in Part XIII of the Companies Act and Sections 621 to 635AA deal with the offences committed under the Act and the procedure to be followed for taking action against the offender. While examining ambit of Sub-section (2) of Section 633 it must be borne in mind

that though the expression ""any proceeding"" is used in the Sub-section, the legislature intended to restrict it only to those proceedings arising out of

negligence, default, breach of trust, misfeasance or breach of duty in respect of duties prescribed under provisions of the Companies Act. Although

Sub-section (2) was expressed in wide language, looking to context and placement of Sub-section and on its true construction the only

proceedings for which relief under Sub-section (2) of Section 633 could be claimed are proceedings against the officer of the company for breach

of duty to the company or criminal proceedings for breach of the provisions of the Companies Act. Sub-section (2) cannot apply to proceedings

instituted against the officers of the company to enforce liability arising out of violation of provisions of other statutes. There is intrinsic indication in

Sub-section (3) of Section 633 to hold that exercise of powers under Sub-section (2) must be restricted in respect of proceedings arising out of

violation of Companies Act. Sub-section (3) provides that relief under Sub-section (2) shall not be granted without notice being served in the

manner specified to the Registrar and such other person to show cause why the relief should not be granted. The expression ""such other person

would cover shareholders of the company or the person authorized by the Central Government to launch prosecution. Sub-section (3) does not

contemplate service of notice on any other authorities who are likely to institute prosecution or enforce civil liability in accordance with statutory

provisions other than the provisions under the Companies Act.

The learned Judge of the Bombay High Court noticed, that prosecutions under other enactments were not at the behest of the Registrar of

Companies or the shareholders of the Company or by a person authorised by Central Government in that behalf. It was held, that it was obvious

that such prosecution to be instituted by the officers appointed under the provisions of the statutes other than the Companies Act, cannot be

prevented by resort to provisions of Sub-section (2) of Section 633 of the Companies Act. The learned Judge referred to an identical provisions

as Section 633 of the Companies Act, which had come up for consideration, before Court of Appeal, in decision reported in Customs and Excise

Commissioner v. Hedon Alpha Ltd. (1981) 2 All ER 697:

The Company in that case carried on business of course book maker. The company failed to pay general betting duty due u/s 2(1) of the Betting

and Gaming Duties Act, 1972, and thereupon the Commissioner of Customs and Excise brought proceedings u/s 2(2) of the 1972 Act to recover

duty from the company, from director who was holder of the bookmaker''s permit and betting office licence and from another director of the

company suing them jointly and severally. The Director claimed that he had acted honestly and reasonably and should be excused and relieved

from liability pursuant to Section 448(1) of the Companies Act, 1948. Section 448(1) of the Companies Act, 1948, inter alia, provided that the

Court may relieve the officer of the Company in respect of negligence, default, breach of duty or breach of trust if he has, acted honestly and

reasonably. The director sought relief u/s 448 and the Appeal Court refused to accede to the request. Lord Justice Stephenson presiding over the

Appeal Court observed.

Furthermore, the language of Section 448 was apt to describe the area in which a company director might be in breach of his duties to the

company, and the ambit and concern, the context or matrix, of the section was company law and the relation of the officer (or auditor) of the

company to the company and not to third persons. The proceedings which qualified for the statutory relief were claims made by companies, or on

their behalf or for their benefit by, e.g., liquidators, the Board of Trade, private prosecutors, including penal proceeding; for the enforcement of the

Companies Act, but not proceedings for the recovery of debts or the enforcement of civil liability to strangers.

Lord Justice Griffiths observed in his judgment:

In my judgment Section 448 has no application to the present claim. Although the section is expressed in wide language it is in my view clearly

intended to enable the court to give relief to a director, who, although he has behaved reasonably and honestly, has nevertheless failed in some way

in the discharge of his obligations to his company or their shareholders or who has infringed one of the numerous provisions in the Companies Act

that regulate the conduct of directors.

15. I respectfully agree with the view expressed by Pendse, J., of the Bombay

High Court, after extensive consideration of the provisions of law

and the law available on the subject.

16. At this stage, it has to be mentioned that D.P. Wadhwa, J., of Delhi High Court in Jagannath Prasad Jhalani v. Regional Provident Fund

Commissioner (Haryana) 62 Cmpany Cases 571, observed, in relation to the decision rendered by the Division Bench of that Court in In re

Beejay Engineers Pvt. Ltd. 53 Company Cases 918 as hereunder:

After examining the various provisions of the Act and some other Acts, it appears to me that perhaps this decision needs reconsideration.

As rightly observed by the learned Judge, Section 633 of the Act cannot be a panacea for all the ills, i.e., defaults offences committed in respect of

various other enactments, those already in force and those which came on the statute book at a subsequent date.

17. I am satisfied that the context and placement of Sub-section (2) as well as Sub-section (3) of Section 633 of the Companies Act, clearly

indicate, that the Legislature desired to restrict the powers, to proceedings to be instituted for, violation of the provisions of the Companies Act

alone. The intrinsic indication in Sub-section (3) of Section 633 would certainly exclude the applicability of the provisions of Section 633 of the

Companies Act to prosecutions commenced under Acts other than the Companies Act. It cannot also be overlooked that various sections in

several other enactments dealing with prosecution of companies and or its Directors, provide for relief under circumstances contemplated therein,

excluding the need to invoke the provisions of the Companies Act.

18. In view of the aforestated reasoning, these petitions, which have no merit, are dismissed.

